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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re OLIVIA J., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

OTIS J.,

Defendant and Appellant.

D044936, D045222

(Super. Ct. No. J515074)

APPEAL from orders of the Superior Court of San Diego County, Julia Kelety,
Judge. Affirmed in part and reversed in part.

Otis J., the father of nine-year-old Olivia J., appeals an order requiring his visits
with Olivia be supervised and an order denying without a hearing his Welfare and

Institutions Code section 388¹ petition in which he requested the vacation of orders and contempt declarations regarding his participation in the Substance Abuse Management System (SARMS), changing the visitation order to delete the supervision requirement, or placing Olivia with him. We hold the juvenile court abused its discretion by requiring visits be supervised and reverse that order. We affirm the order denying the section 388 petition without a hearing without prejudice should Otis wish to file a second section 388 petition requesting placement of Olivia with him.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2003 Olivia telephoned Otis and told him her mother, Lenore T., had injured her. Otis took Olivia to a hospital, where it was determined she had a broken finger. The juvenile court adjudged Olivia a dependent child under section 300, subdivision (a), placed her with her adult sister and ordered reunification services, including unsupervised visits with Otis. Otis reported a history of alcoholism, but said he had been sober for several years. His criminal history included a 1980 conviction for driving under the influence and a 1995 conviction for spousal abuse of Lenore T. He lived with his mother and siblings and acknowledged he did not have appropriate housing for Olivia.

The court ordered Otis to participate in the SARMS program. The SARMS requirements were later modified, but after fulfilling them for a time, Otis did not comply

¹ All statutory references are to the Welfare and Institutions Code.

and the court found him in contempt and sentenced him to five days in custody. He appealed and this court affirmed the order in *In re Olivia J.* (2004) 124 Cal.App.4th 698.

Otis told the social worker he did not believe he needed parenting classes or the SARMS program. He said he did not have a drug problem and had not had a drink in 15 years. In July 2004 the SARMS recovery specialist requested Otis be terminated from the program.

On July 15, 2004, the San Diego County Health and Human Services Agency (the Agency) petitioned under section 387, alleging Olivia's sister was physically abusing her, was allowing the parents to have unsupervised visits and was not providing proper childcare arrangements for Olivia. The social worker requested Otis's visits be supervised because he was not complying with SARMS requirements. At the detention hearing the court required Olivia's visits with Otis be supervised. At the jurisdictional and dispositional hearing on August 4 the court denied Otis's request for unsupervised visits. He appealed. At an ex parte hearing on September 1 he was terminated from the SARMS program because he had had no contact with SARMS for 60 days.

On September 9, Otis's attorney filed a section 388 petition, seeking unsupervised visits with Olivia or her placement with Otis. The petition also sought to vacate the SARMS order and the declarations of contempt, Otis's attorney apparently being unaware that Otis had been terminated from the SARMS program. The petition alleged as changed circumstances or new evidence that Otis's last criminal conviction involving substance abuse was in 1980; there was insufficient evidence to order him into the SARMS program; he had no dirty drug tests through SARMS; he had unsupervised visits

from disposition until April 19, 2004; he was the nonoffending, noncustodial parent; he has an adequate home and adequate income for Olivia; and he regularly visits her, has a bond with her and expanding visitation or returning her to him would strengthen their relationship and be of benefit to her. On September 9, the court summarily denied Otis's petition on the basis that he had not stated a change of circumstances.

We consolidated Otis's appeal of the order denying his request for unsupervised visits with his appeal of the order denying without a hearing his section 388 petition.

DISCUSSION

I. The Order Denying Unsupervised Visits

Otis contends there was no evidence of a risk to Olivia to support the order requiring his visits with her be supervised. He argues the social worker and the court unreasonably assumed the fact he did not participate in the SARMS program created a risk of detriment.

A parent's right to the care and custody of his children and his interest in visitation is a serious, major concern in dependency proceedings. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 49.) Also of paramount importance is the child's best interests and well-being. (*Id.* at pp. 48-51.) Section 362.1, subdivision (a)(1)(A) provides that during the reunification process visitation shall be as frequent as possible consistent with the well-being of the child. Section 362.1, subdivision (a)(1)(B) requires that no visitation order shall jeopardize the child's safety. The juvenile court is vested with broad discretion in determining matters concerning visitation. (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.) The court's exercise of discretion is not disturbed in the absence

of an arbitrary, capricious or patently absurd determination. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1456.)

This record shows an abuse of the court's discretion. The fact Otis had not complied with SARMS requirements did not show a risk to Olivia from unsupervised visits. Otis reported he had not had a drink in many years. There was no suggestion he suffered from any drug addiction. The incident in which Olivia reported that he hit her leg when she continued to play with a car mirror after he told her to stop does not rise to a level of physical discipline warranting supervision of visits. Olivia told the social worker although Otis hit her leg, it did not leave a mark and she is not afraid of him. Otis was the person Olivia called after her mother physically abused her. He took her to a hospital where she was discovered to have a broken finger and received treatment for her injury. From the beginning of the dependency period Otis had unsupervised visits and he and Olivia appeared to continue to enjoy a beneficial relationship. The social worker reported unsupervised visits had gone well. Reports from supervised visits did not suggest a risk to Olivia. During one August 2004 visit Otis asked Olivia what she wanted for her birthday and told her he was unhappy that she called him only when she wanted something and that he would always be there for her. At another visit the social worker reported Otis and Olivia were happy to see each other, Olivia expressed to him she was upset that he had not allowed her to go to her uncle's funeral, and he taught her about telling time and about being polite in addressing adults. The isolated incident of him hitting her leg did not indicate nine-year-old Olivia is in danger of physical abuse from him. That incident and his past problems with alcoholism were insufficient reasons to

justify requiring their visits be supervised. The order requiring supervision of visits is reversed.

II. The Section 388 Petition

Otis also contends the court erred in denying without a hearing his section 388 petition in which he requested the court "vacate SARMS order, dismiss all contempt declarations, order unsupervised visits, place minor with father." Because Otis has been terminated from the SARMS program and we have reversed the order requiring visits be supervised, these issues are moot. In *In re Olivia J.*, *supra*, 124 Cal.App.4th 698, we affirmed the judgment of contempt. The sole issue remaining from the section 388 petition is Otis's request for placement of Olivia with him. The social worker's report dated August 30, 2004, reported Otis was supportive of Olivia being placed with her maternal aunt in Georgia and Olivia has now moved to Georgia to live with her aunt. Considering these circumstances, we affirm the order denying Otis's section 388 petition without prejudice should Otis wish to file a second section 388 petition seeking placement.

DISPOSITION

The order requiring supervision of visits is reversed. The order denying the section 388 petition is affirmed.

McDONALD, Acting P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.